No. 15,337

IN THE

United States Court of Appeals

For the Ninth Circuit

CENTENNIAL INSURANCE COMPANY, a Corporation,

Appellant,

vs.

DAVE SCHNEIDER, Doing Business as Dave Schneider Wholesale Jewelry,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

We have no quarrel with any of the well settled rules upon which plaintiff relies in his brief. Our quarrel is only with his attempt to make those rules controlling in this case.

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(1) THE ISSUE AS TO THE BURDEN OF PROOF UNDER THE AUTOMOBILE CLAUSE.

We agree, for example, that the automobile clause must be read as a whole. It is our position, however, that, read as a whole, it places upon the insured, the

burden of proving that some one was in attendance in or upon the automobile at the time of the loss.

Plaintiff seeks to bolster his position by pointing out that the automobile clause itself refers to itself as an exclusion ("this exclusion shall not apply to property in the custody of a carrier . . ."). The quoted words, however, support our position rather than his. Just as the clause excepts (from the exclusion) a loss which occurred while someone was in attendance in or upon the automobile, it excepts (from the exclusion) a loss which occurred in the custody of a carrier.

It is clear, however, that, if the loss were shown to have occurred in an automobile, the burden would be on the insured and not on the company to prove that the automobile was that of a carrier. Similarly, once an automobile loss is shown to have occurred, the burden must be on the insured, *for it could be on no one else,* to prove that, at the time, someone was in attendance in or upon the automobile.

Plaintiff also contends that the burden of proof should be on defendant for the reason that the automobile exclusion was pleaded by defendant as an affirmative defense.

We may well concede that, generally (although not in every case), a party has the burden of proving that which it is required to plead. This does not mean, however, that a party has the burden of proving every allegation which, for one reason or another (as, for example, for the purpose of clarity), it may find it necessary or advisable to include in a pleading.

For example, the fact that the plaintiff (unnecessarily perhaps) anticipates a defense in his complaint does not shift unto him the burden of proof as to that defense. Similarly, in this case, the burden of proof on the issue of whether plaintiff was in his automobile at the time of the loss was not shifted unto defendant merely because the answer affirmatively alleged that he was not.

If the burden of proof on that issue was originally upon plaintiff (as we believe that it was), it continued to be upon him regardless of what was said on the subject in the pleadings.

In Section J of his brief, plaintiff cites a number of cases in support of his position as to the burden of proof. Each of them is distinguishable as it simply involved the question of the burden of proving an exclusion. None of them involved, as this case does, an exception to an exclusion.

In *Bebbington v. California Western States Life Ins. Co.,* 30 Cal. 2d 157, 180 P. 2d 673, upon which plaintiff primarily relies, the policy excluded coverage "in the event of the death of the insured as a result of airplane travel other than as a fare-paying passenger in licensed aircraft flying a regular scheduled passenger flight". The court held that the insurance company had the burden of proving that the insured was not a passenger in a licensed plane at the time of his death. No other result could have been reached since the policy in that case was not framed in terms of one broad clause excluding air travel coupled with exceptions reinstating the coverage under certain circumstances.

Moreover, it must be noted that there was no hardship in the *Bebbington* case in placing the burden of proof upon the insurance company since the company was in as good a position as the beneficiaries under the policy to prove whether the insured was travelling in a regularly scheduled passenger plane at the time of his death. In this case, however, the insured is the only person who can prove whether he was in or upon the automobile at the time of the loss. Hence, the burden of proof on that issue should be upon him.

Throughout his brief, plaintiff argues that insurance policies must be given a reasonable construction. No construction of the automobile clause is more unreasonable, however, than one which would require the insurance company to prove that the insured was *not* in his automobile at the time of the loss.

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(2) THE ISSUE AS TO THE CLAIMED AMBIGUITY OF THE AUTOMOBILE CLAUSE.

Plaintiff contends that the automobile clause is ambiguous because, instead of excluding "loss of or damage to property", it merely excludes "loss or damage to property". Plaintiff accordingly argues that the clause should be held to exclude only *damage* to property in an automobile and should not apply at all to a *loss* of property from an automobile.

That contention is untenable.

We agree with plaintiff that the provisions of an insurance policy should be understood in their or-

dinary and popular sense, that exceptions must be construed strictly against the insurer and liberally in favor of the insured and that, as between two reasonable constructions of a policy, the one which is most favorable to the insured should be adopted.

The very fact that the provisions of an insurance policy must be understood in their ordinary and popular sense makes it clear, however, that, in this case, the construction of the automobile clause advocated by plaintiff must be rejected.

It is of course our position that the automobile clause contains no ambiguity and that it can and must be construed in only one way, namely, so as to exclude the type of loss which occurred in this case. Even if it were ambiguous, however, it is clear that the strained construction urged by plaintiff would *not* be the construction which the ordinary untrained mind would adopt, for the ordinary untrained mind would be most unlikely to notice the absence of the word "of" after the word "loss".

The very cases cited by plaintiff make it clear that it is only a *reasonable* doubt which is resolved in favor of the insured. In this case, the automobile clause is *not* reasonably capable of the strained construction which he urges.

Plaintiff seeks to distinguish *Ruvelson v. St. Paul Fire & Marine Ins. Co.,* 235 Minn. 243, 50 N.W. 2d 629, one of the cases upon which we rely, on the ground that, in that case, the automobile clause did contain the word "of" after the word "loss". The case cannot be distinguished on the basis of that very slight

difference in wording, however, since three of the six cases which we cited in our opening brief (two of which were also cited in the Ruvelson opinion) excluded "loss or damage to" rather than "loss of or damage to" (*Bliss Ring Company v. Globe and Rutgers Fire Ins. Co.,* 7 Ill. App. 2d 523, 129 N.E. 2d 784; *Kinscherf v. St. Paul Fire & Marine Ins. Co.,* 254 N.Y.S. 382; *Princess Ring Co., Inc. v. Home Ins. Co.,* 52 R.I. 481, 161 Atl. 292).

In the Ruvelson case, the court described the purpose of the clause as follows: ". . . it is difficult to conceive of a more effective deterrent to a potential thief than the presence of someone *in or upon* an automobile. It is extremely unlikely that an attempt would be made to steal from an automobile under these circumstances, and that is no doubt the very thing that the insurer had in mind in requiring actual presence in or upon the automobile" (50 N.W. 2d at 635).

With or without the word "of", the only reasonable construction which can be given to the clause is a construction which will achieve the foregoing objective.

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(3) THE ISSUE AS TO THE SUFFICIENCY OF THE EVIDENCE.

Plaintiff also contends that, in any event, the finding that the jewelry was stolen while he was in his automobile is supported by the evidence.

Plaintiff concedes that the does not know when or how the theft occurred but nevertheless argues that

the trial court could infer that it must have occurred while he was in the car.

It is our position, however, that the loss *cannot* have happened while plaintiff was in the car and that it must accordingly be held to have happened while he was away from it. The jewelry cases could not have been removed from the trunk of the car without his noticing it. Nor could they have been removed therefrom while he was in the middle of heavy traffic without the theft being noticed and being brought to his attention by one of the many drivers who surrounded him.

Since the loss could not have happened under the circumstances under which plaintiff testified that it must have happened, his testimony to that effect must be rejected as inherently incredible and the findings of the trial judge which purport to rely on that testimony must be held to be altogether unsupported by the evidence.

Of all the cases cited by plaintiff in connection with his argument that the evidence sustains the findings, only *Sierra Milling, Smelting & Mining Co. v. Hartford Fire Ins. Co.,* 76 Cal. 235, 18 Pac. 267, need detain us since the other cases merely deal with broad principles (with which we have no quarrel) as to the trial court's power to draw inferences from the evidence.

All that need be said about the *Sierra Milling* case is that, anything in the syllabus (which plaintiff quotes in his brief) to the contrary notwithstanding, the

watchman *was* upon the insured premises at the time when the fire occurred.

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(4) THE ISSUE AS TO THE MYSTERIOUS DISAPPEARANCE CLAUSE.

As the court will note, plaintiff devotes less than a page to the issue which, to us, is the crucial issue in the case, namely, whether the loss was in any event excluded under the mysterious disappearance clause.

It should first be noted that, although plaintiff argued at length that the automobile clause should be read as a whole, he unhesitatingly asks this court to consider only a portion of the mysterious disappearance clause.

The entire clause provides as follows:

> "(M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory. Nor shall this policy cover any shortage in goods claimed to have been forwarded in a package when the package is received by the consignee in apparent good order with seals unbroken, nor for loss of or damage to goods when sent 'C.O.D.' with the privilege of inspection by the consignee before delivery."

Plaintiff, however, quotes only the following part of the clause:

> "(M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory."

Plaintiff then argues that, "taken as a whole", that part of the clause must be construed to cover only an unexplained loss or a mysterious disappearance disclosed upon the taking of an inventory.[1]

It is clear, however, that the clause does *not* exclude only losses disclosed on the taking of an inventory. It excludes all kinds of unexplained losses and mysterious disappearances including losses from packages received in apparent good order with seals unbroken as well as losses of goods sent C.O.D. with the privilege of inspection.

Moreover, the same conclusion would have to be reached even if the one sentence which plaintiff is willing to quote were considered alone, for there is only one way in which that sentence can be construed.

The words "unexplained loss" and "mysterious disappearance" *cannot* be limited to a loss (or shortage) disclosed on the taking of an inventory. They must be held to refer to something else, for, otherwise, the words "unexplained loss" would be mere surplusage (and so would the words "mysterious disappearance").

As this court will note, plaintiff makes no attempt to answer any of our contentions as to the meaning of those words. He must accordingly be held to concede

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[1]It may be noted that, on page 45 of his brief, plaintiff states that "the rules on construction do permit the separation of the words etc.". We assume that plaintiff meant to say that "the rules on construction do *not* permit the separation of the words, etc.". While it is of course our position that the rules of construction not only permit but require the separation of those words, we cannot assume that this typographical slip on plaintiff's part was intentional.

that, if their application cannot be restricted as he seeks to restrict it, the clause exclude the loss which occurred in this case.

As we pointed out in our opening brief, had plaintiff simply testified that he did not know how his jewelry disappeared (without claiming that it disappeared from an automobile), he would have been denied recovery because of the mysterious disappearance exclusion.

The fact that, in addition to testifying that he did not know how the loss occurred, he also testified that it occurred while the jewelry was in an automobile should not place him in a stronger position.

Recovery should be denied on both grounds rather than just on one.

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(5) THE ISSUE AS TO PLAINTIFF'S FAILURE TO MAINTAIN THE NECESSARY INVENTORY.

Plaintiff in effect concedes that he did not maintain the required "separate listing of all travelers' stocks". Plaintiff contends, however, that defendant cannot complain of his failure to do so since it does not claim that plaintiff did not suffer a loss or that the inventory which he eventually submitted was inaccurate.

This, in effect, is nothing but a bold attempt by plaintiff to pull himself up by his own boot straps.

Plaintiff was required to maintain a separate listing of travelers' stocks so as to make it possible for defendant to check the accuracy of the claims which he might make under the policy. Having withheld

from defendant the information which would have enabled it to check the accuracy of this particular claim, plaintiff is hardly in a position to contend that, since defendant does not question its accuracy, his failure to submit the necessary information is immaterial.

In fact, our position can be stated in even simpler terms. It is merely that plaintiff made it impossible for defendant to check the loss and that the policy requires defendant to pay only those losses which it had an opportunity to check.

The decision of this court in *National Union Fire Ins. Co. v. California C. Credit Corp.,* 76 F. 2d 279, upon which plaintiff relies is altogether distinguishable. This court held that a policy which required the insured to "keep, or cause to be kept" certain records had been substantially complied with since the necessary records were kept (although not by the insured itself). In this case, however, there was no compliance at all with the requirements of the policy.

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(6) CONCLUSION.

As we pointed out in our opening brief, the policy involved in this case covered easily stolen merchandise of high value and was issued to a policyholder who, like all travelling jewelers, was a target for thieves. Hence, it is not surprising that defendant was willing to pay only for losses which plaintiff could explain.

Nor is it surprising that it was willing to pay only for those automobile losses which occurred despite plaintiff's presence in or upon the automobile.

In this case, plaintiff failed to prove that he was in or upon his automobile when the jewelry was stolen and coverage was accordingly excluded by the automobile clause of the policy. Moreover, coverage was also excluded by the unexplained loss and mysterious disappearance clause of the policy.

Finally, recovery should in any event have been denied plaintiff because of his failure to maintain the necessary inventory.

For the foregoing reasons, the judgment should be reversed.

Dated, San Francisco, California,
May 17, 1957.

Respectfully submitted,

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